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No. 99-159

IN THE

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

RESPONDENT'S SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.8, Respondent Montrose Chemical Corporation of California ("Montrose") respectfully submits this supplemental brief to bring to the Court's attention a matter occurring subsequent to the filing of Montrose's opposition to American Motorists Insurance Company's ("AMICO") petition for writ of certiorari, which directly bears on the pending case and further demonstrates that AMICO's petition should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 20, 1999, AMICO filed its petition for writ of certiorari challenging two rulings by the trial court in this insurance "bad faith" action.

First, AMICO challenged the trial court's December 10, 1998 interlocutory discovery order finding *prima facie* evidence that AMICO fraudulently asserted that Montrose was not a "named insured," and thereby waived its attorney-client privilege under California's crime-fraud exception to the attorney-client privilege (*See* Cal. Evid. Code § 956).[1] As a result of the *prima facie* evidence of AMICO's fraud, the trial court required AMICO to submit *in camera* all attorney-client privileged documents relating to the "named insured" issue regardless of whether the documents were prepared in connection with the "bad faith" action or in connection with appeals in related coverage actions that were pending when AMICO filed its petition for writ of certiorari with this Court.

1. California Evidence Code Section 956 provides in relevant part that "[t]here is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

Second, AMICO challenged the trial court's January 13, 1999 order refusing to stay enforcement of the December 10 crime-fraud order pending resolution of the related appeals in the coverage actions.[2]

Although the trial court's rulings were based on a fact-specific application of California law, for which United States Supreme Court review is not available, AMICO attempted to manufacture Supreme Court jurisdiction by invoking the rhetoric of federal due process. AMICO asserted that the trial court's fraud order and refusal to stay enforcement deprived AMICO of its right to counsel and right of access to the courts by interfering with AMICO's simultaneous prosecution of the related appeals.

On August 18, 1999, Montrose filed its opposition to AMICO's petition for writ of certiorari, stating that this Court should deny AMICO's petition because, *inter alia*: (1) the Court lacks jurisdiction to review the trial court's rulings; and (2) the trial court properly found that AMICO waived its attorney-client privilege, and denied AMICO's renewed request to stay the case, in a manner that does not raise any constitutional questions.[3] AMICO did not file any reply to Montrose's opposition.

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2. The California Court of Appeal summarily denied AMICO's petition for writ of mandate challenging both the trial court's December 10, 1998 and January 13, 1999 rulings on February 19, 1999. *See* Appendix to the Petition for Certiorari at 2a ("Pet. App."). On April 21, 1999, the California Supreme Court summarily denied AMICO's petition for review. Pet. App. at 1a.

3. For a detailed discussion of the factual background of this case, the decisions below, and the reasons for denying AMICO's petition for writ of certiorari, the Court may refer to Montrose's opposition brief. In this supplemental brief, Montrose will only discuss the portions of the case that are relevant to events occurring subsequent to the filing of respondent's opposition.

Subsequent to the filing of Montrose's opposition, the appellate court in the related appeals rendered a decision that directly undermines the basis of AMICO's challenge of the trial court's rulings. As discussed below, this new development provides an additional and dispositive reason for denying AMICO's petition for writ of certiorari.

ADDITIONAL REASON FOR DENYING THE WRIT

It is incumbent upon Montrose to advise this Court of a new factor that will affect the Court's consideration of this case. *See, e.g., Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) ("[C]ounsel have a continuing duty to inform the Court of any development which may affect the outcome" of a case); *Bd. of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (same).[4]

As discussed in AMICO's petition and Montrose's opposition, AMICO seeks to invoke this Court's jurisdiction by asserting that the trial court deprived AMICO of its right to counsel and right of access to the courts in the related appeals by requiring AMICO to submit all documents relating to its ongoing fraud for the trial court's *in camera* review.[5]

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4. *See also* Rule 15.8 ("Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing"); 5 Am. Jur. 2d, Appellate Review, § 387 (1995); 23 Moore's Federal Practice, ¶ 515.09 (Matthew Bender 3d ed.).

5. Since the crime-fraud exception to the attorney-client privilege applies if the privileged material reasonably relates to the

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Although the trial court implemented safeguards to fully protect AMICO's legitimate interests in the pending appeals,[6] AMICO argued that the trial court deprived AMICO of its right to counsel and right of access to the courts by refusing to stay enforcement of the December 11 Order. For example, AMICO stated its challenge as follows:

> By refusing to stay the Order pending the appeals, the trial court seeks to eviscerate AMICO's access to counsel *before* final resolution of the very issue upon which AMICO's right to counsel depends. Moreover, by forcing AMICO to share all past and future communications with its adversary while the appeals are pending, AMICO is denied any confidential access to its counsel in connection with ongoing appeals that attack the very foundation of the trial court's ruling.

Petition at 9. AMICO's challenge of the trial court's ruling therefore rested on two bases: (1) the trial court purportedly

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subject matter of the ongoing fraud (*BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1269-1271 (1988); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1415 (S.D. Cal. 1994)), the trial court properly required AMICO to submit *in camera* all documents relating to its ongoing fraud in asserting the "named insured" defense, regardless of whether they were prepared in connection with the "bad faith" action or the appeals in the coverage actions.

6. The trial court did not require AMICO to disclose formerly privileged documents directly to Montrose. Rather, the trial court required AMICO to submit all documents relating to the "named insured" issue for *in camera* review so that the court could protect AMICO's work product and litigation files, and redact or withhold from production any documents that would prejudice AMICO's litigation of its appeals.

required AMICO to share confidential communications with Montrose without due process; and (2) while the appeals in the coverage actions were pending. Neither basis had any merit when AMICO filed its petition, and AMICO's challenge is now further undermined by the appellate court's ruling in the related appeals.

First, the trial court *never* required AMICO to share formerly privileged communications directly with Montrose. Instead, the trial court required AMICO to submit its documents *in camera*, a procedure which this Court has endorsed. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (noting that *in camera* review "is a [lesser] intrusion upon the confidentiality of the attorney-client relationship than is public disclosure") (citation omitted). As set forth in Montrose's opposition, AMICO also had due process of law by exercising its immediate and direct access to the appellate courts with the assistance of its counsel when it filed its petition for writ of mandate with the California Court of Appeal and petition for review with the California Supreme Court.

Second, the appeals are no longer pending. The appellate court has resolved the appeals adversely to AMICO without considering any additional evidence discovered in the "bad faith" action. The Court of Appeal declined to consider the evidence of AMICO's fraud in asserting its "named insured" defense discovered in the course of the "bad faith" action, and ruled as a matter of law that Montrose is a "named insured" based upon the plain language of the AMICO policies.[7] The Court of Appeal wrote:

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7. The AMICO policies refer to the three policies that AMICO wrote for Montrose's former 50% shareholder — the Stauffer Chemical Company — and that covered Stauffer's "owned or controlled subsidiaries or affiliated companies or corporations now existing or hereafter created."

> It is hardly surprising that, as a result of AMICO's refusal to provide a defense and its insistence that Montrose is not a "named insured," Montrose has sued AMICO for bad faith. (*Montrose Chemical Corp. v. American Motorists Insurance Company, et al.*, L.A. Super. Ct. Case No. BC130486.) [footnote omitted] On these consolidated appeals, *Montrose refers to stacks of documents obtained through discovery in the bad faith action* that, according to Montrose, support its position regarding the meaning of "named insured," *and Montrose has asked us to consider documents that were not in its possession at the time the "consolidated motions" were before the trial court*. AMICO, in turn, asks us to deny Montrose's request to consider additional evidence on appeal and claims, in any event, that the documents do no more than create triable issues of fact about the meaning of "named insured." As will appear, *we find the policy language to be plain on its face, and therefore deny the requests to take additional evidence on appeal.*

Montrose Chemical Corp. of California v. American Motorists Ins. Co., California Court of Appeal, Second Appellate District, Case No. B122750, consolidated with B122893 (August 26, 1999) at 17 ("*Montrose v. American Motorists*") (emphasis added).[8]

As the Court of Appeal stated, it was unnecessary to rely on any additional evidence discovered in the "bad faith"

8. The Court of Appeal's decision is unpublished and lodged concurrently with Montrose's supplemental brief.

action because the uncontroverted evidence in the coverage actions established that Montrose was an insured:

> *Simply put, the evidence that is admitted or uncontroverted establishes as a matter of law that Montrose is a named insured under the AMICO policies.* (§ 437c, subd. (f)(1); 3 Couch on Insurance (3d ed. 1995) § 40.6, p. 40-9.) The conclusory assertions to the contrary offered by AMICO in opposition to Montrose's "consolidated motion" are not supported by competent evidence (indeed, most are unsupported by any evidence at all), leaving no triable issues of material fact. *Other than a seemingly suicidal desire to provide more grist for Montrose's bad faith mill, we see no basis in law, logic or reason for AMICO's continuing refusal to concede defeat on this point.* [footnote omitted]

Montrose v. American Motorists, at 20 (emphasis added).

Thus, it is clear that AMICO was not deprived of its right to counsel or right of access to the courts as a result of the trial court's order requiring AMICO to submit *in camera* all documents relating to its ongoing fraud in asserting that Montrose was not a "named insured." AMICO has had its appeals heard and resolved without consideration of the documents at issue.

AMICO's challenge to the trial court's January 13, 1999 order, which refused to stay enforcement of the December 11 crime-fraud order, is also undermined by these recent events. AMICO's entire challenge to the January 13 Order

is based on the trial court's refusal to stay the crime-fraud order *pending the resolution* of the appeals in the coverage action.[9] AMICO stated that "[p]ending resolution of this ["named insured"] issue by the Court of Appeals [sic] . . . there has been no final determination that AMICO's asserted ["named insured"] defense is, in fact, invalid." Petition at 12.

There has now been a resolution of the appeals in the coverage actions, with the Court of Appeal rejecting AMICO's "named insured" defense as invalid and ruling that Montrose is a "named insured" as a matter of law based on the plain policy language. *See Montrose v. American Motorists*, at 18 ("In plain English, the policies define 'named insured' as Stauffer and its 'owned or controlled subsidiaries or affiliated companies or corporations now existing or hereafter created.' [footnote omitted] Since it is undisputed that Stauffer owned 50 percent of Montrose and that the companies were 'affiliated' with each other, *it must be immediately apparent to everyone except AMICO that, under any rational construction, Montrose is a named insured under the relevant policies*") (emphasis added).

Since the appeals were resolved adversely to AMICO without consideration of any additional documents discovered in the course of the "bad faith" action, AMICO's challenge to the trial court's refusal to stay enforcement of the crime-fraud order pending resolution of the appeals is now moot.

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9. *See* Petition at i (Question Presented: "Whether trial court orders that . . . (c) refuse any stay of the 'fraud' order *pending the resolution of such appeals*, deny the litigant due process of law and its rights to counsel and to access to the courts under the United States Constitution") (emphasis added).

Indeed, the Court of Appeal's decision confirms the correctness of the trial court's ruling. Based upon uncontroverted evidence, the Court of Appeal rejected AMICO's "named insured" defense in the coverage actions, terming the result "obvious." Although the question of whether AMICO committed fraud in asserting its "named insured" defense will ultimately be resolved by a jury, the Court of Appeal's conclusion that "it must be immediately apparent to everyone except AMICO that, under any rational construction, Montrose is a named insured under the relevant policies," supports the trial court's order finding *prima facie* evidence that AMICO knowingly asserted a meritless defense.

AMICO based its request for a stay of the trial court's crime-fraud order on the theory that the appellate court might conclude that there is a triable issue of fact regarding Montrose's status as a "named insured." Now that the appellate court has concluded otherwise — finding that Montrose is a "named insured" as a matter of law — there is no basis for AMICO's challenge of the trial court's ruling.[10] AMICO's petition for writ of certiorari should therefore be denied.

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10. As set forth in Montrose's opposition, the trial court's ruling would not have been undermined even if the appellate court had found that there *was* a triable issue of fact regarding Montrose's status as a "named insured." *See* Opposition at 11-12.

CONCLUSION

For the reasons set forth above, in addition to those set forth in respondent's opposition, Montrose respectfully requests this Court to deny AMICO's petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE FILED AUGUST 26, 1999

(Omitted here but submitted separately as Lodging Appendix)